No. 94-158 (5)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

L. BATES,

Petitioner,

against

ROBERT WALKER,

Respondent.

JOHN MAHONEY,

Petitioner,

against

MICHAEL MAYS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY

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PETITIONERS' REPLY

In large measure, our petition dealt with respondents' contentions. Some additional comments are, however, warranted.

Mays argues that petitioner did not raise the instant issue in the Court of Appeals (*Mays* Br Pt I). The rule invoked by Mays, which is not jurisdictional in any event (*Vance v Terrazas,* 444 US 252, 258-59 n 5 [1980]; Stern, Gressman, Shapiro, Geller, Supreme Court Practice § 6.26, pp 345-348 [1993]), is inapposite because, although petitioners have framed their argument differently in this Court, the instant *issue* (Petition, p i) is identical to the issue raised in the court below.[1] The rule relates to "issues" (*E.E.O.C. v Federal Labor Relations Authority,* 476 US 19, 24 [1986]), not reframed arguments. *Batson v Kentucky,* 476 US 79, 84 n 4 (1986).

Petitioners' reframing of the argument does not change the issue because petitioners' present argument raises the same constitutional principles as the precedent principally invoked below, *Mathews v Eldridge,* 424 US 319 (1976). Admittedly, neither *Parratt v Taylor,* 451 US 257 (1981), nor *Hudson v Palmer,* 468 US 517 (1984), were cited. However, "*Parratt* and *Hudson* represent a special case of the general *Mathews v Eldridge* analysis, in which post-deprivation tort remedies are all the process that is due simply because they are the only remedies the State could be expected to provide." *Zinermon v. Burch,* 494 US 113, 128 (1990). Further, we cited *Zinermon*[2] and *Parratt* and *Hudson* were central to the decision in *Patterson v Coughlin,*

[1]The issue stated below was:

"should the administrative appeal be ignored in evaluating the constitutional adequacy of the process the inmate received merely because the inmates suffered some temporary confinement and loss of privileges between the disciplinary conviction and the appellate reversal * * *" (*Mahoney* Brief in Second Circuit, p 2).

[2]*Zinermon* was cited for the proposition quoted *infra,* pp 4-5.

1985), *cert den*, 474 US 1100 (1986), upon which the court below principally relied.

As in *Batson v Kentucky*, petitioners framed their argument in the Second Circuit in an effort to avoid inviting that court directly to reconsider *Patterson*. However, after urging that *Patterson* was not controlling under *Shalala v Schaefer*, 113 S Ct 2625, 2631 n 4, 125 L Ed 2d 239, 249 n 4 (1993),[3] petitioners argued at length that the balance of the competing interests embodied in the settled three factor analysis established by *Mathews v Eldridge* supported their position.[4] Petitioners have not changed the issue raised below, but rather have reframed their argument so as to focus upon the sharp essence of their claim. In sum, the controlling constitutional principles were in play and the relevant factors were raised. The dissenting judge in *Walker*

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[3]*Patterson* had had no occasion to consider whether administrative reversal could cure hearing error because there had been an administrative affirmance there.

[4]Notably, in discussing the three *Mathews* factors in their Second Circuit briefs, petitioners stated that New York's regulations mandated all the hearing elements required by *Wolff v McDonnell*, 418 US 539 (1974), and urged that "given the numbers of hearings, errors are inevitable at the hearing level" (*Bates* Br, pp 10, 12; *see, Mahoney* Br, pp 13-16, 34-35). Petitioners argued, citing *Hewitt v Helms*, 459 US 460 (1983), that petitioners' private interest was not of great consequence and his interest in the confinement between the hearing and the administrative reversal was no greater than the interest at stake in prehearing confinement, as there was not yet a finalized disciplinary determination (*Bates* Br, pp 8-10; *Mahoney* Br, pp 28-30). Petitioners also argued that administrative review "was the most practical remedy both for the State and for the inmate. For both parties, the remedy is quick and economical. The State gains an opportunity to correct its errors. The inmate gains a further opportunity to vindicate himself." (*Bates* Br, p 12; *see, Mahoney* Br, p 34.)

v Bates chose to address those considerations, 23 F3d at 659-660, and they were clearly before the Second Circuit.

Respondents also claim that the decisions below are consistent with the decisions of this Court and the other circuits requiring *Wolff v McDonnell* procedures prior to the imposition of punishment. None of this precedent, however, including *Wolff* (*see*, Petition, p 23), addressed, implicitly or explicitly, the instant issue. Indeed, as far as can be determined from the decisions, there were either no appeals or administrative affirmances in every case except *Cleavinger v Saxner*, 474 US 193 (1985), and *Harper v Lee*, 938 F2d 104 (8th Cir 1991), so there was no occasion even to consider the issue. *Cleavinger* is inapposite for the reasons stated in our petition (p 14).

Harper supports our position to the extent it held that the "administrative appeal process is part of the due process protection afforded prisoners," 938 F2d at 105, as the Second Circuit itself agreed in *Young v. Hoffman*, 970 F2d 1154, 1156 (2d Cir 1992), *cert denied*, 114 S Ct 115, 126 L Ed 2d 80 (1993); *see also, Forbes v Trigg*, 976 F2d 308, 319 (7th Cir 1992). That is fundamental. *Zinermon* explained why:

> "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided . . . This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation and any remedies

for erroneous deprivations provided by statute or tort law." 494 US at 126.

Mays is wrong in stating (Br, p 16) that the decisions below brought the Second Circuit into conformity with *Harper* and its own decision in *Young*. The decisions below rely on the rule that "[o]nce a cause of action for a constitutional violation accrues, nothing that the State does subsequently can cut off the § 1983 action." 23 F3d at 657. Following that rule, a § 1983 action based on the denial of civil rights (*Heck v Humphries*, 114 S Ct 2364, 2370, 129 L Ed 2d 383, 392 [1994]) accrued in *Harper* and *Young* when the hearing error occurred and the inmates were at least entitled to nominal damages notwithstanding the subsequent administrative reversal. *Carey v Phiphus*, 435 US 247 (1978). Of course, *Harper* and *Young* held that the reversal obviated the § 1983 claim entirely. 938 F2d at 105, 970 F2d at 1156.

This conflict demonstrates the type of disarray among the circuits and within the Second Circuit warranting certiorari. It is no answer with respect to the intra-circuit conflict that the Second Circuit should speak first to the State's regulatory scheme and immunities as the "most familiar" jurisdiction (*Mays* Br, p7). The decision below fully canvassed the regulatory scheme, concluding that it comports with *Wolff. Walker*, 23 F3d at 655-656. The jurisdiction most familiar with the State's immunities, New York's highest Court, has spoken. *Arteaga v State*, 72 NY2d 212 (1988).

Further, respondents cannot deny the split among the circuits in the interpretation of *Zinermon*. Respondents notwithstanding (*Mays* Br, pp 6-7), the Second Circuit's internal conflict in interpreting *Zinermon* (and *Harper*) is simply

further reason why certiorari should be granted. *See, O'Neal v McAninch,* 114 S Ct 1396, 128 L Ed 2d 70 (1994), where certiorari was granted to resolve an internal conflict within the Sixth Circuit as to the proper allocation of the burden of proving harmless error in habeas corpus.[5]

Contrary to respondents, the circuit decisions in conflict (Petition, pp 12-13) are not distinguishable because they rest on individualized and wholly distinguishable facts. Nor are they inapposite (*Mays* Br. p14) because they involved property, not liberty. *Zinermon,* 494 US at 131-132. Rather, they are pertinent because they upheld the proposition that not every hearing officer error in a predeprivation hearing will lead to § 1983 liability based on the denial of procedural due process, provided the state law accorded a sufficiently detailed scheme for the hearing and there is an adequate remedy to correct the hearing officer error.

Certiorari should be granted because of the validity of that proposition is an issue of national significance and a matter of clear disagreement between the circuits.

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[5]*Compare, O'Neal,* 3 F3d 143, 145 (6th Cir 1993) (burden on petitioner), with *Stoner v Sowers,* 997 F2d 209, 213 (6th Cir 1993) (burden on State).

Dated: Albany, New York
October 7, 1994

Respectfully submitted,

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